IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 780 of 2001
with
CIVIL REVISION APPLICATION No 781 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HARISHCHANDRA FARASRAM
Versus
ARDAVIRAF S/O FARAMROZ DINSHAWJI KAPADIA

Appearance:
1. Civil Revision Application No. 780 of 2001
MR ASPI M KAPADIA for Petitioner No. 1
MRS KETTY A MEHTA for Respondent No. 1

CORAM : MR.JUSTICE SHARAD D.DAVE

Date of decision: 22/03/2002

C.A.V. JUDGEMENT

1. The applicant submits that he has filed S.C.S. no. 53/01 for declaration and injunction on 16.4.01 against the opponent wherein a separate application for

appointment of court commissioner at exh. 6 was also submitted. Inspite of Caveat petition no. 68/01 is on the suit record, the ex-parte order appointing the court commissioner was passed by the trial court on 16.4.01 and ultimately resulted into the court commissioner's partial ex-parte panchanama report made on 16.4.01 at Mark-A. Inspite of neither further direction nor further application for getting direction was submitted by the court commissioner, the order below Mark A was passed on 21.6.01 by the trial court. It is against these orders, the present civil revision applications are preferred.

2. According to Mr.Kapadia, L.A. for the applicants in both the revision applications, the trial court failed to direct notice to the defendant prior to passing ex-parte order below exh. 6. Inspite of the fact that in various decisions of Supreme Court and High Court, the ratio has been held that it is not the business of the court to collect evidence for a party, the trial court passed the order below exh. 6. Inspite of the specific direction made by the trial court in its order below exh. 6 no prior written notice has been given to the defendant by the court commissioner. It is erred by the trial court that on perusal of the notice given by the court commissioner, there is specific endorsement of the court commissioner that the son of the defendant has refused to sign on the said notice and the defendant is not present and there is reason to believe that the said notice is duly served to the defendant as his son has refused to sign the same. Therefore, the ex-parte order below exh. 6, the panchanama report at mark A and the order passed below Mark A be set aside by allowing these revision applications with cost.

3. The learned advocate for the respondents in both the revision applications filed a common affidavit-in-reply in both the revision applications on 14.8.01 wherein it is stated that no caveat was served on or before 16.4.01. That the plaintiff filed S.C.S. no. 53/01 and it is clear from rojkam that there is no endorsement of any caveat having been received before that date. On 16.4.01 the trial court passed order appointing Shri Alkesh I Gandhi, Advocate as court commissioner to make panchanama of the suit premises after giving due and prior notice to the respective parties. Therefore the order was passed on a specific condition that the commissioner must make panchanama after giving due and prior notices to the respective parties. The court has power to appoint commissioner subject to notice to the other side. Accordingly, Mr.Gandhi had sent a written notice to defendant who is

the present applicant at his residence in the presence of the plaintiff and clerk of advocate Mr.S.K.Kazi. However, the defendant's major son refused to sign and accept the notice. Therefore, only copy was left. Accordingly, notice was served to both the parties. It is denied that ex-parte order was passed by the learned trial court on 16.4.01. Inspite of the notice, if the present appellant/defendant chooses to remain absent, no court can help such a person. Under Order 39 Rules 7 & 8, the court has power to order for panchanama after giving due notice to the parties. Therefore, in the instant case, same thing was done and there is no breach of rules or natural justice as alleged.

4. According to L.A. for the respondents, the property was given on rent to the plaintiff and it was in dilapidated condition and the if the ceiling is not repaired, it will fall down and therefore it was necessary to appoint court commissioner and make panchanama of the portion of the property. The ground floor of the rented premises was also in dilapidated condition and therefore also the panchanama of the position was necessary. If the ceiling is bad and in dilapidated condition, flooring above the ceiling was also required to be seen. On 16.4.01, as no one remained present on behalf of the original defendant/present appellant and as he keeps first floor from the staircase going upstairs locked, the commissioner could not go up. Accordingly, he pointed out in his report that there is staircase going upstairs. The key of the first floor was with the defendant. No panchanama could be made of the position of the flooring on the first floor which was touching the ceiling.

5. It is further submitted that after order was passed below exh. 7, written notice was given to the defendant by the court commissioner and order was passed below Mark A and defendant was directed to get opened the first floor portion of the suit property by giving key to the court commissioner for drawing panchanama of the portion of the first floor. In view of these facts, the revision applications deserve to be dismissed.

6. Section 148 A is a right to lodge a caveat. This section is salutary. Without it, parties sometimes obtained ex parte interim orders without any intimation to the opposite parties causing inconvenience and even detriment to them. The object of the section is twofold, firstly to provide an opportunity to such opposite parties to be heard before an ex parte order is made and show cause why it should not be passed, and secondly to

avoid multiplicity of proceedings for without such a provision a person not a party to the application would have to file a proceeding to get rid of an order on the application if it affects him adversely. Sub-sec. (1) enables a person claiming the right to appear at the hearing of an application for an interim order to lodge a caveat. Sub-sec.(2) requires such a Caveator to serve a notice of his caveat on the person by whom an application for an interim order has been or is expected to be made. Sub-sec.(3) requires the Court before such an order is made to serve notice of it to the Caveator and sub-sec. (4) requires the applicant to serve on the Caveator a copy of his application together with any papers or documents filed or intended to be filed in support of his application. Such a caveat will remain in force for ninety days from the date of its filing unless the application referred to in sub-sec.(1) has been made before the expiry of the said period.

The application referred to in sub-sec(1) is a substantive application. Any person likely to be affected by an order that may be passed can file the caveat. He need not be a necessary party to the application. No particular form for the caveat is prescribed and therefore it can be in the form of a petition. The caveator must specify that nature of the application that is or is likely to be filed and his right to appear and oppose at its hearing.

7. Although it is true that no order should be passed against the caveator unless he is heard, where by any genuine reason, the caveator is not present at the time of hearing of the application, and where the Court finds that there is a prima facie case in favour of the applicant, ad interim relief should ordinarily be granted by the Court so that an irreversible situation may not be created. The caveator can be heard immediately thereafter within a short time. Once a caveat is lodged it becomes the duty of the Court to serve a notice of the application on the caveator. Giving of notice to the caveator is a condition precedent for the court to pass any order affecting the caveator. The words `notice of application' have a settled meaning under the regime of the Code and they cannot mean anything if they do not refer to the exact date of hearing. The court serving notice on the caveator under Sec. 148A (3) has therefore to give a specified date for hearing of the application.

8. In light of the aforesaid discussion, if we peruse the facts of the case before me, it appears that the trial court did see the endorsement made on the docket of the plaintiff regarding the caveat no. 68/01

made by the Registrar, Small Cause Court, Surat, however, from his explanation, as I called for the same, through the District Judge Surat, the learned trial Judge made it clear which is produced in his own words : "I have seen the notes made by the Registrar that there is a Caveat Application no. 68/01 but in my humble view as I have given the direction to the Court commissioner to make the detailed report after giving prior notices to the parties, I have not called upon the otherside while passing the order below application exh. 6 for appointment of the Court Commissioner."

9. I am of the opinion that the very basic purpose of filing the caveat is hereby frustrated. More so, in the present case, when the tenant has shown much more space than the rented premises. It is true that the landlord has filed the objection against the report of the court commissioner, however, by not issuing notice to the Caveator, I am of the opinion that there is violation of principles of natural justice and therefore the order of the trial court in appointing the court commissioner, when there is caveat application pending and endorsement made to the effect on the docket, not issuing the notice is bad in law. I would have considered otherwise, if there would be injunction application restraining the landlord/defendant from taking forcible possession, however, in the present case, when there is a question of only appointment of commissioner, the court's notice to the caveator would suffice before passing any order. One more aspect which goes against the respondent/defendant is that the commissioner went for commission work and he issued notice to the son of the defendant who according to him, was major, however, his name is not written and according to him, he refused to receive the notice and also refused to open the door of the first floor. In my view, there is no need to make hurry of the panchanama and it would have been done on the next day and waited for the defendant to come and in his presence the panchanama would have been done. I am fully aware about the principles that inspite of caveat application, the court has all powers to grant any order, however, in the facts and circumstances before me, I am of the opinion that the court commissioner's work would have been delayed for some hours and that would not have much difference in the aspect of the commission work. Therefore, I am of the opinion that the commission work done by the commissioner Mr.Gandhi deserves to be set aside and that after hearing he defendant, the court shall pass order of commission work.

10. Therefore, both these revision applications are

allowed and the ex-parte order passed below exh. 6, the panchanama report dated 16.4.01 and order passed below Mark A are set aside.

11. The trial court is hereby directed to hear the application exh. 6 for the appointment of court commissioner afresh. Accordingly, both the Civil Revision Applications are allowed. Rule is made absolute. No orders as to cost.

(SHARAD D DAVE, J)

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